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1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF OHIO

3 WESTERN DIVISION

4
5 THE KROGER CO.,)
6)
7 Plaintiff,) Case No.
8)
9 vs.) 0-1-02 439
10)
11 MALESE FOODS CORP., formerly)
12 known as MALESE FOODS CORP.,)
13)
14 Defendant.)
15 -----)

16 DEPOSITION OF LAWRENCE KADISH

17 Old Westbury, New York

18 Wednesday, January 21, 2004

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20
21
22
23
24 Reported by:
KRISTIN KOCH, RPR
25 JOB NO. 731

<p style="text-align: right;">Page 94</p> <p>Kadish</p> <p>1 2 A. I don't recall what -- I don't 3 recall. I might have been very involved with 4 other situations or I may have just been waiting 5 to see what Kroger would do and then I would 6 respond appropriately. I don't remember. It 7 was a few years back.</p> <p>8 Q. Mr. Giobbi, why didn't you contact 9 him at some point in time and say "I am ready to 10 put an offer in to buy Merrill Lynch's 11 position"?</p> <p>12 A. I did. I got sluffed off.</p> <p>13 Q. Why didn't you send a formal demand 14 to him or a formal offer?</p> <p>15 A. I don't recall.</p> <p>16 Q. Do you recall at any point in time 17 after learning that Kroger had bought out 18 Merrill Lynch's position learning either from 19 Mr. Price or some other source that in 2001 or 20 early 2002 Kroger was interested in buying out 21 the master lease?</p> <p>22 A. I'm sorry, I lost you. You have to 23 say it again.</p> <p>24 Q. Any time in late 2001 or 2002 after 25 Kroger bought out Merrill Lynch's position, did</p>	<p style="text-align: right;">Page 95</p> <p>Kadish</p> <p>1 2 you learn either from Mr. Price or from some 3 other source that Kroger was interested at that 4 point in time in buying out the master lease 5 early?</p> <p>6 A. Yes.</p> <p>7 Q. Your response was what to that 8 inquiry?</p> <p>9 A. Jim Price contacted me.</p> <p>10 Q. And you told him that you weren't 11 interested?</p> <p>12 A. I said, "I don't know. What are they 13 going to offer me?" He said, "well, they will 14 offer you" -- oh, I think I got a letter, or I 15 don't remember if it was a letter or orally. 16 "Well, they will give you the discounted value 17 of the rent you are gonna receive, a few dollars 18 there. They computed it, what you are going to 19 get." And I told him that I am not interested.</p> <p>20 Q. Why weren't you interested?</p> <p>21 A. I couldn't understand what had 22 occurred from the Merrill Lynch standpoint, why 23 I didn't get an opportunity to bid, why I was 24 bypassed. I was under the impression that 25 Kroger may have paid 20 million bucks above the</p>
<p style="text-align: right;">Page 96</p> <p>Kadish</p> <p>1 2 mortgage to buy Merrill Lynch's position and the 3 people at Merrill Lynch said, "what are you 4 bothering? What are you going to go to Kadish 5 for? He is never going to pay this kind of 6 money. We got a great price out of Kroger. 7 Don't even bother looking for bids." That's 8 what I assumed happened. Why -- Merrill Lynch 9 has an Achilles heel. They are always concerned 10 about getting criticized for not trying to get 11 the -- and it was -- I was confused on the 12 subject. I didn't understand what had occurred 13 and I was just giving a lot of thought to the 14 subject and wondering if I should explore it 15 further with legal action against Merrill Lynch 16 to find out why I wasn't given an opportunity to 17 bid and had Merrill Lynch done anything improper 18 with the inducement to me of buying four K-Mart 19 properties with a promise that I would be given 20 an opportunity to bid on the Kroger, and that's 21 as clear as I can remember and I think it's 22 accurate as to what went -- what I -- I assumed 23 that Kroger paid such an outrageously high price 24 and I assumed that it had to be like 20 million 25 above the mortgage, 20 million cash above the</p>	<p style="text-align: right;">Page 97</p> <p>Kadish</p> <p>1 2 mortgage, that the people at Merrill Lynch said, 3 "what are we going through this bidding process? 4 Kadish will never come close to that. Let's not 5 waste our time. Let's just convey to Kroger."</p> <p>6 Q. You know, don't you, that Kroger want 7 to sell the San Marcos property to Butt?</p> <p>8 A. I found that out recently.</p> <p>9 Q. You knew based on your conversations 10 with Butt that they wanted to buy the property; 11 correct?</p> <p>12 A. Yes.</p> <p>13 Q. Was it your thought that you would 14 refuse to go along with Kroger's purchase option 15 demand in order to demand a premium for them 16 buying out your interest so that they could 17 convey clean title to Butt?</p> <p>18 A. No, I did not track the HE Butt 19 situation. I didn't place any thought as to 20 what HE Butt wanted to do or didn't want to do. 21 I know that they had signed a contract with me 22 to buy the property subject to me delivering, 23 and if that didn't occur, I really didn't know 24 if Butt was still interested in purchasing or 25 would be happy just continuing on with their</p>

<p style="text-align: right;">Page 98</p> <p>1 Kadish</p> <p>2 lease. I had no way of knowing that, nor was I</p> <p>3 concerned about it.</p> <p>4 Q. So the thought of getting a premium</p> <p>5 from Kroger so they could convey clean title to</p> <p>6 Butt --</p> <p>7 A. I don't know what you mean by a</p> <p>8 "premium." Could you say that question a little</p> <p>9 clearer?</p> <p>10 Q. Sure. The thought of you being</p> <p>11 compensated in order to allow Kroger to convey</p> <p>12 clean title to Butt, that never came into your</p> <p>13 thought processes; correct?</p> <p>14 A. Correct.</p> <p>15 Q. I think this is clear, but I just</p> <p>16 want to clarify for the record, and I understand</p> <p>17 from your counsel that you are still</p> <p>18 investigating looking into this. Do you know by</p> <p>19 name anyone from Kroger that did anything</p> <p>20 improper, either with Mr. Price or someone from</p> <p>21 Merrill Lynch, that adversely affected your</p> <p>22 interest?</p> <p>23 A. It appears to me that the party that</p> <p>24 signed -- what is that, Exhibit 2?</p> <p>25 MR. CINQUE: Are you talking about</p>	<p style="text-align: right;">Page 99</p> <p>1 Kadish</p> <p>2 these letters that we marked.</p> <p>3 A. (Continuing) James E. Hodge.</p> <p>4 Q. Do you know Mr. Hodge?</p> <p>5 A. No.</p> <p>6 Q. Do you know what, if any,</p> <p>7 conversations or interaction he was having with</p> <p>8 Mr. Price or anyone else from Merrill Lynch</p> <p>9 separate and apart from the fact that his name</p> <p>10 is on that letter?</p> <p>11 A. I don't remember. The only memory of</p> <p>12 anybody that I -- other than looking at this</p> <p>13 letter and this letter signed by Waldvogel, the</p> <p>14 only name that I remember at Kroger was Keller,</p> <p>15 who used to work there years ago and then worked</p> <p>16 for K-Mart and then retired. He was the head of</p> <p>17 the real estate department, and I didn't know</p> <p>18 him until he worked for K-Mart, but I don't</p> <p>19 remember any names at Kroger.</p> <p>20 Q. And, again, just so it is clear,</p> <p>21 other than the two names that appear on Exhibits</p> <p>22 1 and 2, you don't have any other information or</p> <p>23 knowledge at this point in time as to anything</p> <p>24 that any individual person from Kroger did or</p> <p>25 should have done; is that fair?</p>
<p style="text-align: right;">Page 100</p> <p>1 Kadish</p> <p>2 MR. CINQUE: Just to make it clear,</p> <p>3 we haven't deposed Kroger yet.</p> <p>4 MR. PHILLIPS: You have made that</p> <p>5 crystal clear.</p> <p>6 A. As of today, no.</p> <p>7 (Kadish Exhibit 7, Complaint for</p> <p>8 Declaratory Judgement, Injunction, and</p> <p>9 Breach of Contract, marked for</p> <p>10 identification.)</p> <p>11 Q. Mr. Kadish, I have handed you Exhibit</p> <p>12 7, which is a copy of the Complaint that we</p> <p>13 filed in this action. I am not going to ask you</p> <p>14 any questions about the Complaint. I am really</p> <p>15 interested in the letters that are attached,</p> <p>16 Exhibits 1 through 3 towards the end. Do you</p> <p>17 see those? There is a letter from Kroger dated</p> <p>18 February 18, 2002. Do you have that document in</p> <p>19 front of you, sir?</p> <p>20 A. Yes.</p> <p>21 Q. This is a letter dated February 18,</p> <p>22 2002, to, among others, yourself, and other</p> <p>23 parties, and it's sent by James Hodge, vice</p> <p>24 president of Kroger; is that correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 101</p> <p>1 Kadish</p> <p>2 Q. Do you recall receiving this document</p> <p>3 or this letter on or about February 18, 2002?</p> <p>4 A. Well, it says "certified mail," so I</p> <p>5 must have received it.</p> <p>6 Q. This is Kroger's attempt to exercise</p> <p>7 the purchase option, Article 35, of the April</p> <p>8 1983 lease; correct?</p> <p>9 A. Yes.</p> <p>10 Q. Then if you turn to the next letter,</p> <p>11 it is a letter dated March 14, 2002, and this is</p> <p>12 a letter that you sent to Kroger on or about</p> <p>13 March 14, 2002; is that correct?</p> <p>14 A. Yes.</p> <p>15 Q. I notice in this letter, if you want</p> <p>16 to review it, take all the time you need, but I</p> <p>17 notice in this letter there is nothing in here</p> <p>18 about -- there is no objection to Kroger</p> <p>19 improperly taking out Merrill Lynch's position;</p> <p>20 is that correct?</p> <p>21 MR. CINQUE: Objection to the form.</p> <p>22 Look at the third paragraph. That's not</p> <p>23 fair.</p> <p>24 MR. PHILLIPS: I agree with your</p> <p>25 counsel. Let me rephrase the question.</p>

26 (Pages 98 to 101)